

The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOHN DOE #1, an individual, JOHN
DOE #2, an individual, and PROTECT
MARRIAGE WASHINGTON.

Plaintiffs,

SAM REED, in his official capacity as
Secretary of State of Washington,
BRENDA GALARZA, in her official
capacity as Public Records Officer for the
Secretary of State of Washington.

Defendants.

NO. 09-cv-05456-BHS

DEFENDANTS' OPPOSITION
TO MOTION FOR
PROTECTIVE ORDER

I. INTRODUCTION

Defendants Sam Reed and Brenda Galarza oppose the Plaintiffs' Motion for a Protective Order for the reasons stated below.

II. BACKGROUND

In this case, the Plaintiffs seek to restrain the Secretary of State from publicly releasing any documents revealing the identity of persons who signed petitions to qualify Referendum Measure No. 71 (RM-71) for the November 2009 ballot. The Court has scheduled a hearing on September 3, 2009, to consider the Plaintiff's Motion for a Preliminary Injunction.

In support of their claims, the Plaintiffs have also filed a Motion for a Protective Order that would (1) permit the Plaintiffs to file certain declarations under seal; (2) permit the Plaintiffs to redact personal information from filings not filed under seal; (3) permit the Plaintiffs to file unredacted copies of documents under seal, if the Court so desires; and (4) prohibit the Defendants and their agents from revealing the names of certain categories of individuals.

III. ARGUMENT

A. The Plaintiffs Fail To Overcome The Strong Presumption Against Sealing Court Records.

As the Plaintiffs note, there is a “strong presumption in favor of access to court records.” *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003) (citation omitted). A party seeking to seal a judicial record bears the burden of overcoming this strong presumption by meeting the “compelling reasons” standard. *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (citing *Foltz*, 331 F.3d at 1135). The party must articulate compelling reasons supported by specific factual findings. *Kamakana*, 447 F.3d at 1178 (citing *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1102-03 (9th Cir. 1999)). The Court must consider the general history of public access and the public

1 policies favoring disclosure, such as the “public interest in understanding the judicial process.”

2 *Kamakana* at 1178-79 (citing *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995)).

3 This litigation concerns the application of the State’s public disclosure laws as related
 4 to the exercise of the people’s state constitutional right of referendum. As such, the
 5 proceedings are of great interest to the general public. The accessibility of public access to
 6 court records and court proceedings (with narrow exceptions not applicable here) is at least as
 7 strongly based in tradition and public policy as the State’s statutory provisions concerning
 8 public disclosure of public records. The public interest in understanding the judicial process is
 9 very strong here.

10
 11 The Plaintiffs base their Motion for a Protective Order primarily upon the assumption
 12 that they will prevail in their Motion for a Preliminary Injunction. Pls.’ Mot. for Prot. Order at
 13 5-7. As discussed in their Opposition to the Preliminary Injunction Motion, the Defendants
 14 disagree that the Plaintiffs are likely to prevail on the merits of their case, or that they have
 15 shown a likelihood of irreparable harm if injunctive relief is not granted in their favor. For the
 16 same reasons, the Plaintiffs have not shown compelling reasons why this Court should limit
 17 public access to documents filed in this proceeding. The Plaintiffs have shown no more than
 18 the possibility of embarrassment or inconvenience if their signatures on the RM-71 petitions
 19 are publicly revealed, and that is not sufficient to meet the standards for either injunctive relief
 20 or a protective order.

21
 22
 23 **B. The Motion As Filed Is Overbroad, And Would Extend To Matters Not Before
 24 The Court.**

25 The issue in this case is whether the public should have access to petitions filed with
 26 the Secretary of State in support of Referendum Measure 71. The issue is whether the

1 identities of a single narrow class—signers of the petitions—should be protected from public
 2 disclosure. Yet, the Plaintiffs seek to use a Protective Order not only for individuals who
 3 signed the Referendum 71 petitions, but also for (1) individuals or organizations that
 4 “supported the Referendum 71 petition process”; (2) individuals or organizations that are
 5 members or contributors to Protect Marriage Washington; (3) individuals or organizations
 6 “that oppose[] Referendum 71”;¹ and (4) individuals or organizations that support “a traditional
 7 view of marriage.” Pls.’ Mot. for Prot. Order at 2. Unless they are also signers of the RM-71
 8 petitions, the rights and interests of supporters of the petition campaign, members or
 9 contributors of Protect Marriage Washington, and supporters of a “traditional definition of
 10 marriage” are not at issue in this case. It is not obvious that persons in these adjunct (at best)
 11 categories should even have the need to file documents in this case. If they gratuitously choose
 12 to do so, it is even less obvious why their identities deserve special protection.

13
 14 It is even more troubling that the proposed Protective Order would prohibit “the
 15 Defendants, their agents, servants, employees, officials, or any other person acting in concert
 16 with them” from revealing the names of any or several categories of persons, including
 17 members or contributors to Protect Marriage Washington, or, again, individuals supporting a
 18 “traditional view of marriage.” The proposed Order at least arguably would extend far beyond
 19 the scope of the pleadings, which concern the Secretary of State’s duties with respect to the
 20 disclosure of petition material. The proposed Order could be construed, for instance, to cover
 21 (1) information in the possession of the Secretary of State for some reason other than the filing
 22 of the RM-71 petitions or information filed in this case; and (2) information in the possession

23
 24
 25
 26¹ Logically, an “opponent” of RM-71 might be a person who *opposes* qualifying the measure for the
 ballot, although that would be a surprising way to read the Plaintiffs’ proposal.

1 of other state agencies, who are not named in the case but could be interpreted as covered by
 2 the Order.

3 The Defendants believe that the underlying Motion for a Preliminary Injunction is not
 4 well-taken and should be denied. If it is denied, there is no remaining basis for entering a
 5 Protective Order. However, even if the Court were to grant some continuing injunctive relief,
 6 any Protective Order entered should be carefully narrowed to the actual issues presented in the
 7 case and the parties thereto, and supported with appropriate findings as required by *Kamakana*,
 8 447 F.3d at 1178.

10 **IV. CONCLUSION**

11 For the reasons stated above, the Motion for a Protective Order should be denied.

12 DATED this 27th day of August, 2009.

14 ROBERT M. MCKENNA
 15 Attorney General

16 s/ James K. Pharris
 17 JAMES K. PHARRIS, WSBA #5313
 18 Deputy Solicitor General
 19 PO Box 40100
 Olympia, WA 98504-0100
 360-664-3027
 jamesp@atg.wa.gov

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2009, I electronically filed Defendants' Opposition to Motion for Protective Order in the above-referenced case with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following:

Stephen Pidgeon, attorney@stephenpidgeon.com
James Jr Bopp, jboppjr@aol.com
Scott F. Bieniek, sbieniek@bopplaw.com
Sarah E. Troupis, stroupis@bopplaw.com

DATED this 27th day of August, 2009.

s/ James K. Pharris
James K. Pharris